THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 062/07

In the matter between:

SIPHIWE ALTON SHABALALA **APPELLANT**

and

METRORAIL **RESPONDENT**

Coram: **SCOTT, HEHER, JAFTA, MAYA *et* COMBRINCK JJA**

Date of hearing: **20 November 2007**

Date of delivery: **28 November 2007**

Summary: **Commuter shot and robbed on train – action for damages – Metrorail could not be expected to have had a security guard in each and every carriage.**

Citation: This judgment may be referred to as *Shabalala v Metrorail* [2007] SCA 157 (RSA)

SCOTT JA/….

SCOTT JA:

[1] The appellant, a 44 year-old man, was shot and robbed while a passenger on a train operated by the respondent. He subsequently instituted action in the Johannesburg High Court alleging negligence on the part of the respondent and claiming damages arising from gunshot wounds he sustained in the attack. The court *a quo* (Horn J) was asked to decide only the issue of the respondent's liability and to direct that the issue of the quantum of damages stand over for later determination. The court decided the former issue in the respondent's favour and dismissed the action with costs. The judgment is reported as *Shabalala v Metrorail* 2007 (3) SA 167 (W). The appeal is with the leave of this court.

[2] The appellant testified that at about 7 pm on 21 May 2004 at Dunswart railway station he boarded a train bound for Springs with the intention of travelling as far as Brakpan station. Before boarding the train he observed about 11 commuters waiting on the station. He said there were no security guards on the platform and there was no ticket examiner at the entrance to the station. When the train arrived he got on and sat down. The other 11 commuters got into the same coach. As the train pulled away three men in the coach stood up. One of them confronted the appellant and demanded money. When the appellant said he had none, the person produced a handgun and without further ado fired three shots. The appellant was hit twice in the leg and once in the arm. He fell to the floor and his assailant searched his pockets, taking R130 in cash, a train ticket and a wrist watch. In the meantime, the other two who had stood up busied themselves robbing other passengers in the coach. When the train arrived at the next station, which was Benoni, the appellant managed to get off the train. Two security guards, one male and the other female, came to his assistance. He pointed out the robbers to them but they attended to him rather than attempt to apprehend the robbers. The train pulled off with the robbers still on board.

[3] The appellant testified that the 11 persons who had waited on the platform at Dunswart station all gave the appearance of being normal

passengers. There was similarly nothing untoward about the appearance of the three robbers. The gunman wore a leather jacket which covered his hips. He drew his firearm from under his jacket. The appellant could not say whether the robbers had boarded the train at Dunswart or whether they were already in the coach when the train arrived at the station.

[4] In the course of cross-examination, the appellant testified that there were usually security guards on the trains on which he travelled. He said this was the case 'especially during the day' and 'on occasions at night'. Some of the security guards, he said, were armed while others had 'two-way radios'. They all wore uniforms. The appellant inferred that there were no security guards in the other coaches at the time of the robbery. But this inference, he said, was based on the fact that he 'banged on the coach', while being attacked and no one came to his assistance. Given the fact there was no door linking the coach in which he travelled to the next one, and also the noise the train in motion would have made, the inference was unjustified.

[5] The above was the sum total of the evidence placed before the trial court. After the appellant had testified he closed his case. The respondent thereupon also closed its case.

[6] In his particulars of claim the appellant alleged that the respondent (the defendant in the court below) had been negligent in the following respects:

'1. The Defendant failed to ensure the safety of members of the public in general and the Plaintiff in particular on the coach of the train in which the Plaintiff travelled;

2. The Defendant failed to take any or adequate steps to avoid the incident in which the Plaintiff was injured when by the exercise of reasonable care they could and should have done so;

3. The Defendant failed to take any or adequate precautions to prevent the Plaintiff from being injured on the moving train;

4. The Defendant failed to employ employees, alternatively, failed to employ an adequate number of employees to prevent passengers in general and the Plaintiff in particular from being injured in the manner in which he was.

5. The Defendant failed to employ employees; alternatively, failed to employ an adequate number of employees to guarantee the safety of passengers in general and the Plaintiff in particular;

6. The Defendant neglected to employ security staff alternatively sufficient security staff on the platform and/or the coach in which the Plaintiff was travelling to ensure the safety of the public in general and the Plaintiff.'

It will be observed, in passing, that the grounds of negligence relied upon are all of a general nature and relate to a systemic failure on the part of the respondent. In other words, the alleged failure did not relate to an omission on the part of an individual employee to act in a particular way in relation to the specific incident in question, but rather to an omission of a general nature on the part of the respondent to put in place measures that would ensure the safety of commuters travelling on the respondent's trains.

[7] It is now well-established that a negligent omission, unless wrongful, will not give rise to delictual liability. The failure to take reasonable steps to prevent foreseeable harm to another will result in liability only if the failure is wrongful. It is the reasonableness or otherwise of imposing liability for such a negligent failure that will determine whether it is to be regarded as wrongful. See eg *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11. If it is reasonable to do so, the defendant will be said to have owed the injured party a legal duty to act without negligence; that is to say, to take such steps as may have been reasonable to avert the harm. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) it was held that Metrorail was obliged to take reasonable measures to provide for the security of commuters while making use of its rail transport. However, the court (in paras 79-81) emphasized that the obligation to which it referred arose by virtue of the Legal Succession to the South African Transport Services Act 9 of 1989; it was a public law obligation and did not automatically give rise to a legal duty for the purpose of the law of delict. In this court, counsel were agreed that the respondent was indeed obliged to act without negligence. In other words, given the foreseeability of harm to commuters resulting from criminal activity, it was agreed that the respondent owed commuters a legal duty to take such steps as were

reasonable to provide for their safety and that the failure to take such steps would render it liable in delict.

[8] It appears from the evidence of the appellant that the respondent had indeed adopted measures to avert crime by employing security guards both on its trains and on railway platforms. The question in issue is therefore whether the appellant discharged the burden of establishing on a balance of probabilities that those measures were unreasonable in the circumstances and that had reasonable measures been taken the attack would not have occurred. When considering this question it is important to bear in mind that merely because the harm which was foreseeable did eventuate does not mean that the steps taken to avert it were necessarily unreasonable. See *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan* 2006 (6) SA 537 (SCA) para 14. To hold otherwise would be to impose on the respondent a burden of providing an absolute guarantee against the consequence of criminal activity on its trains. There clearly is no such burden and the appellant did not contend that there was.

[9] Whether there were security guards present in any of the other coaches at the time of the attack is unclear. What is clear is that there was no security guard present in the coach in which the appellant travelled from Dunswart station to Benoni station. It is also clear that to avert the attack on the appellant there would have had to be, at the least, one security guard present in that coach. I say ‘at the least’ because given the willingness of the assailant to shoot the appellant in response to no more than the latter’s statement that he had no money, the presence of a single security guard, even if suitably armed, may well have made no difference. Indeed, attacks by armed robbers on security guards, even when armed, are sadly not uncommon. But even assuming that the presence of a security guard in the coach would have served as a deterrent sufficient to thwart the attack, the question remains whether it would be reasonable to require the respondent to have a security guard, whether armed or otherwise, in each and every coach of every train. If regard is had to the large number of railway coaches employed by the respondent to convey commuters many kilometres each day,

such a requirement would, in my view, exceed by far the precautionary measures that could reasonably be expected of an enterprise operating a commuter train service. No doubt in particular circumstances it may be reasonable to expect the respondent, regardless of the cost, to place armed security guards in each and every coach of a train travelling on a particular line. Typically, the need for such special precautions could arise if a particular line had been identified as being particularly dangerous on account of repeated criminal activity. But there was no evidence to suggest that this was so in the case of the line from Dunswart to Benoni.

[10] Counsel for the appellant sought to make something of the fact that there were no security guards on Dunswart station. But whether this was unreasonable or not need not be decided. It is clear from the appellant's own evidence that whether there were or not, would have made no difference. There was nothing about the appearance of the commuters waiting on the station to indicate that any of them might be armed robbers; nor was it established that the robbers boarded the train at Dunswart station. Counsel did not suggest that the respondent was required to take steps to ensure that each and every commuter was searched before boarding a train, nor was this pleaded. It is conceivable that it might be reasonable in appropriate circumstances for the respondent to adopt such an extreme measure, but once again, no evidence was tendered to suggest the existence of such special circumstances.

[11] It was also emphasized on behalf of the appellant that the nature and extent of the precautionary measures adopted by the respondent were peculiarly within its knowledge. This, of course, is so. But it does not mean that the respondent bore the onus of establishing that it could not reasonably have prevented the robbery from taking place. The onus of proof remained on the appellant throughout. Had, however, the appellant placed before the court at least some evidence giving rise to an inference of negligence on the part of the respondent which was causally connected to the robbery, the latter would have been obliged to adduce evidence to rebut that inference or face the prospect of having judgment granted against it. But, as I have indicated, the

evidence of the appellant makes it clear that the attack could only have been averted by having an armed security guard in that particular coach. In the absence of further evidence to justify the need for a security guard in each coach, the failure on the part of the respondent to ensure that there was such a security guard present in each coach does not give rise to an inference of negligence. It is true, as counsel argued, that any such further evidence that there may have been, would have been within the knowledge of the respondent, but that did not preclude the respondent from ascertaining the existence of such evidence, whether by seeking discovery of documents in the respondent's possession, or requesting particulars for trial or otherwise.

[12] It follows that in my view the appellant failed to discharge the burden of proving negligence on the part of the respondent and to this extent the appeal must fail. The court *a quo* granted judgment against the appellant. In my view the correct order should have been one of absolution from the instance. I propose to amend the order accordingly.

[13] The appeal is dismissed with costs, including the costs of two counsel. The order of the court *a quo* is altered to read as follows:

> '(a) Absolution from the instance is granted.
>
> (b) The plaintiff is ordered to pay the costs of the defendant.'

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

HEHER JA
JAFTA JA
MAYA JA
COMBRINCK JA